

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PAUL STEELMAN, LTD.,

Plaintiff,

v.

WESTCHESTER SURPLUS LINES
INSURANCE COMPANY, *et al.*,

Defendants.

Case No. 2:08-cv-1359-LDG (RJJ)

ORDER

Westchester Surplus Lines Insurance Company ("Westchester") has filed two motions (##27, 49) asking the court to reconsider the September 28, 2009, decision granting Paul Steelman, Ltd.'s ("Steelman") motion for partial summary judgment and to vacate the resulting order granting partial summary judgment. Steelman has opposed both motions (##30, 40, 55, 56) and Westchester has filed its replies (##33, 42, 57).

This court may revise any interlocutory order at any time prior to the entry of final judgment. Fed. Rule Civ. Pro. 54(b); *See Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 464 (9th Cir.1989). Generally a court will not reexamine an issue previously decided by the same or higher court in the same case. *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766 (9th Cir.2001); *United States v. Cuddy*, 147

1 F.3d 1111, 1114 (9th Cir.1998). However, a court has discretion to do so when the moving
2 party shows: 1) an intervening change in the law; 2) additional evidence that was not
3 previously available; or 3) that the prior decision was based on clear error or would work
4 manifest injustice. See *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369
5 n. 5 (9th Cir.1989).

6 In its second motion for reconsideration, Westchester asserts that, subsequent to
7 the court's order, it received a document, an Affidavit of Service, showing that the
8 Mashantucket Pequot Tribal Nation's claim against Steelman was first made on January 4,
9 2007, rather than January 5, 2007. Steelman responds that (a) this additional evidence
10 does not alter the court's prior analysis; (b) does not raise a genuine issue of fact; and (c)
11 that Westchester should have discovered this document as it is a publicly filed document in
12 the Nation's litigation against Steelman.

13 Fundamental to the court's prior analysis was its ruling that, pursuant to the terms of
14 the insurance policy, a claim is "first made against an Insured" when it is made against (a)
15 the insured, or (b) an agent of the insured who has authority to provide written notice of the
16 claim to the insurer. The court held that the Nation's claim was first made against
17 Steelman when its counsel, Corby Arnold, "first received and became aware of the
18 [Nation's] complaint." The court found that this event occurred on January 5, 2007.

19 Even without consideration of the additional evidence submitted by Westchester, a
20 review of the evidence submitted by Steelman submitted in support of its motion for partial
21 summary judgment reveals that this finding was clearly erroneous. Steelman's evidence
22 consisted solely of (a) the affidavit of Arnold, and (b) a single-page document attached to
23 the affidavit: the "Service of Process Transmittal." The contents of the Transmittal
24 indicates that the Nation's complaint was served on Steelman's statutory agent on January
25 3, 2007, that it was sent to Arnold "via Fed Ex 2 Day," and that it was "RECEIVED JAN - 5,"
26 with 2007 handwritten immediately after the stamp. In his affidavit, Arnold averred "[t]hat

1 on January 5, 2007, [he] received a Service of Process Transmittal from [Steelman's
2 statutory agent].” Arnold further averred that he “first became aware that Steelman's
3 statutory agent for service of process in Connecticut had been served with the Summons
4 and Complaint by reviewing the transmittal. . . .”

5 This evidence would support a finding that, on January 5, 2007, Arnold first received
6 the Transmittal. The evidence would also support a finding that, on January 5, 2007,
7 Arnold first became aware that the Nation's complaint had been served on Steelman's
8 statutory agent. Such findings, however, are irrelevant as to when Arnold first received and
9 was first made aware of the Nation's complaint against Steelman. That Arnold first
10 received the transmittal is irrelevant as to when he first received the complaint. That Arnold
11 first learned, on January 5, 2007, that the statutory agent had been served is irrelevant as
12 to when he first became aware of the complaint against Steelman. Rather, a review of the
13 evidence establishes that Steelman failed to offer any evidence as to when Arnold first
14 received the complaint (rather than the transmittal) and first became aware of the complaint
15 (rather than its service on the statutory agent). Accordingly, the court's finding that this
16 occurred on January 5, 2007, was clearly erroneous and requires that the court vacate the
17 order granting partial summary judgment in favor of Steelman.

18 The court's determination that its prior order must be vacated is bolstered by the
19 evidence submitted by Westchester: a Process of Service filed in the underlying
20 proceeding by the Nation against Steelman. Construed in the light most favorable to
21 Westchester, the Process of Service indicates that Arnold, as agent for Steelman, was
22 personally served with a copy of the Nation's Summons and Complaint on January 4,
23 2007—the day before he first received the Transmittal from Steelman's statutory agent and
24 the day before he first became aware that the statutory agent had been served. Such
25 evidence confirms that a genuine issue of material fact exists as to when Arnold first
26 received and first became aware of the Nation's complaint.

1 For purposes of managing its docket, the court will vacate the September 28, 2009,
2 Order in its entirety, and will issue, contemporaneous to this order, a new order resolving
3 Westchester's Motion to Dismiss (#6) and Steelman's Motion for Partial Summary
4 Judgment (#21).

5 Therefore, for good cause shown,

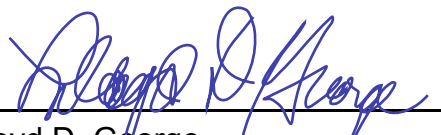
6 THE COURT **ORDERS** that Westchester Surplus Lines Insurance Company's
7 Motion to Vacate, Set Aside and/or Reconsider the Order Granting Plaintiff's Motion for
8 Partial Summary Judgment (#49) is GRANTED; The Court's September 28, 2009, Order
9 Granting Plaintiff's Motion for Partial Summary Judgment is VACATED.

10 THE COURT FURTHER **ORDERS** that the Clerk of the Court shall STRIKE the
11 September 28, 2009, Order.

12 THE COURT FURTHER **ORDERS** that Westchester Surplus Lines Insurance
13 Company's Motion for Reconsideration of September 28, 2009 Order (Doc. 26) Granting
14 Partial Summary Judgment in Favor of Plaintiff (#27) is DENIED as moot.

15 THE COURT FURTHER **ORDERS** that Paul Steelman's Motion for Partial Summary
16 Judgment (#54), which relies on the vacated September 28, 2009, Order, is DENIED
17 without prejudice.

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19 DATED this 21 day of May, 2010.

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22 Lloyd D. George
23 United States District Judge
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